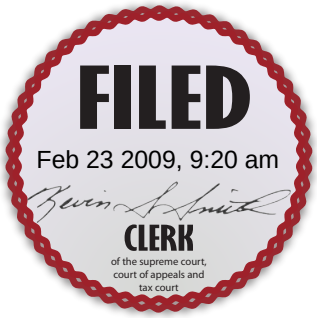

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IN THE COURT OF APPEALS OF INDIANA

FRANK W. FRYE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 19A04-0811-CR-660
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DUBOIS CIRCUIT COURT
The Honorable William E. Weikert, Judge
Cause No. 19C01-0711-FB-290

February 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Frank W. Frye pled guilty pursuant to a plea agreement to armed robbery, auto theft, criminal confinement, failure to stop after an accident resulting in non-vehicle damage, and being a habitual traffic violator for life. In exchange, the State dismissed a pending Class A felony charge and other felony charges. The trial court sentenced Frye to sixteen years in the Department of Correction and eight years of probation, and he appeals his sentence. On appeal, Frye argues that the trial court abused its discretion by failing to recognize his guilty plea as a significant mitigating circumstance and that his sentence is inappropriate. Concluding that the trial court did not abuse its discretion in rejecting Frye's proffered mitigating factor because Frye received a substantial benefit in return for his guilty plea and that Frye's sentence is not inappropriate, we affirm.

Facts and Procedural History

On June 9, 2008, Frye pled guilty pursuant to a plea agreement to Class B felony armed robbery,[1] Class D felony auto theft,[2] Class B felony criminal confinement,[3] Class B misdemeanor failure to stop after an accident resulting in non-vehicle damage,[4] and operating a motor vehicle after forfeiture of license for life.[5] In exchange, the State dismissed charges for Class A felony burglary resulting in bodily injury,[6] Class B felony

[1] Ind. Code § 35-42-5-1(2).

[2] Ind. Code § 35-43-4-2.5(b)(1).

[3] Ind. Code § 35-42-3-3(a)(2), -3(b)(2)(A).

[4] Ind. Code §§ 9-26-1-4(a)(2), 9-26-1-8(b).

[5] Ind. Code § 9-30-10-17.

[6] Ind. Code § 35-43-2-1(2)(A).

burglary,[7] and Class C felony intimidation.[8] At the guilty plea hearing, the State laid a factual basis, establishing that on November 22, 2007, Frye operated a motor vehicle in Jasper, Indiana, even though he knew that his driving privileges were suspended for life. Tr. p. 10. On that date, while driving a vehicle, Frye caused damage to four trees owned by Hubert Stenftenagel. Without notifying the proper authorities, Frye left the scene of the accident. *Id.* Also on that date, while armed with a gun, Frye took shotguns, a rifle, and a credit card from Charles Morrison, and then, while armed with a gun and a knife, Frye bound Morrison with a cord. *Id.* at 9-10. Frye also exerted unauthorized control over Morrison's 1989 Dodge Dakota truck with the intent to deprive Morrison of the vehicle's value or use. *Id.* at 9. The trial court accepted the plea agreement. Appellant's App. p. 44-45.

After a sentencing hearing, the trial court found as aggravating circumstances Frye's history of criminal and delinquent behavior and that he was on probation when he committed the instant offenses. The trial court identified no mitigating circumstances. Tr. p. 17. The trial court sentenced Frye as follows:

> The sentence will be . . . sixteen years . . . . In Counts 2 and 5 [armed robbery and criminal confinement], both B felonies, the sentence will be sixteen years, based upon my assessment of the aggravating factors and the mitigating factors, and then concurrent to that will be Count 4 [auto theft], which will be three years, concurrent. Those are all concurrent, 2, 4, and 5 . . . . After that we have Count 6 [failure to stop], a hundred and eighty days, suspended, and 7 [operating a motor vehicle after forfeiture of license for life] is concurrent, which is four years, suspended. . . . The probation starts . . . when you are released from prison, and it will be for four years in the B

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[7] I.C. § 35-43-2-1(1).

[8] Ind. Code § 35-45-2-1(a)(1), -1(b)(2).

> felonies, plus four years in Count 7, for a total of eight. Also you are ordered to pay restitution.

Id. at 17-18. Pursuant to the plea agreement, the sentences imposed on Counts 2, 4, and 5 were ordered to run consecutively with the sentences imposed on Counts 6 and 7. Appellant's App. p. 47. Thus, Frye's aggregate sentence is sixteen years in the Department of Correction followed by eight years of probation. *Id.* at 5-6. Frye now appeals his sentence.

Discussion and Decision

Frye raises two issues on appeal. First, he argues that the trial court abused its discretion by failing to recognize his guilty plea as a significant mitigating circumstance. Second, he argues that his sentence is inappropriate.[9]

I. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* We review the presence or absence of reasons justifying a sentence for an abuse of

[9] Frye frames his argument as follows: "Frye has a history of substance abuse and took responsibility for his actions by pleading guilty. The sixteen year sentence imposed by the trial court with respect to Count II and Count IV was inappropriate given the nature of the offense, the character of the defendant and the aggravating and mitigating circumstances." Appellant's Br. p. 5 (capitalization omitted). We remind counsel that whether a trial court has abused its discretion by improperly recognizing aggravators and mitigators when sentencing a defendant and whether a defendant's sentence is inappropriate under Indiana Appellate Rule 7(B) are two distinct analyses. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491.[10] One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

Frye argues that the trial court abused its discretion in failing to recognize his guilty plea as a significant mitigating circumstance. A defendant who pleads guilty generally deserves "some" mitigating weight to be afforded to the plea. *Anglemyer*, 875 N.E.2d at 220 (citing *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)). However, our Supreme Court has recognized that a trial court does not necessarily abuse its discretion by failing to recognize a defendant's guilty plea as a significant mitigating circumstance. *Id.* at 221. Instead, a trial court is only required to identify mitigating circumstances that are both significant and supported by the record, and "a guilty plea may not be significantly mitigating when . . . the defendant receives a substantial benefit in return for the plea." *Id.* (citing *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)).

Here, in exchange for Frye's guilty plea, the State dismissed a Class A felony charge, a Class B felony charge, and a Class C felony charge. Appellant's App. p. 47. In addition, the plea agreement provided that Frye's sentences for armed robbery, auto theft, and criminal confinement would be served concurrently and that his sentences for operating a motor vehicle after forfeiture of license for life and failing to stop after an

[10] Thus, Frye's claim that the trial court did not properly weigh the aggravating and mitigating circumstances, Appellant's Br. p. 1, does not raise a cognizable issue.

accident resulting in non-vehicle damage would be served concurrently. *Id.* Thus, Frye received a substantial benefit from his plea agreement and the trial court did not abuse its discretion in failing to recognize his guilty plea as a significant mitigating circumstance.[11]

II. Inappropriate Sentence

Frye also argues that his sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Regarding the nature of Frye's offenses, we have not been provided with many details by the factual basis laid by the State or the evidence presented during the sentencing hearing. However, we know that Frye's actions on November 22, 2007, created multiple victims. Tr. p. 18 (imposition of restitution orders in favor of two individuals and two companies). Frye, who knew that he was not permitted to operate a motor vehicle, drove a car and damaged the car and another person's property. *Id.* at 6-7. He also broke into Morrison's home, stole items, "fir[ed] off a shot past Mr. Morrison's

[11] Although it has no bearing upon our analysis, we observe that Frye sought to withdraw his guilty plea in this matter but withdrew his request before his sentencing hearing. Appellant's App. p. 4-5, 51.

ear, threaten[ed] his life . . . . And then before leaving, [Frye] t[ook] photographs of Mr. Morrison's family as further indication that he would harm Mr. Morrison or his family further if Mr. Morrison cooperated with the police or [prosecution]." *Id.* at 14-15. We cannot say that the nature of these offenses renders Frye's sentence inappropriate.

Regarding Frye's character, twenty-nine-year-old Frye has an extensive and serious history of criminal and delinquent activity. As the trial court observed during sentencing, Frye had juvenile adjudications for three batteries and a burglary. As an adult, Frye has four prior convictions for battery, convictions for intimidation, invasion of privacy, resisting law enforcement, and public indecency, and he violated the terms of probation for an earlier offense when he committed these offenses. *Id.* at 17. As Frye acknowledges in his brief, his character "is that of a citizen who has had substantial criminal history." Appellant's Br. p. 8. Nothing about Frye's character renders his sentence inappropriate.

Thus, Frye's aggregate sixteen-year sentence in the Department of Correction followed by eight years of probation is not inappropriate pursuant to Indiana Appellate Rule 7(B).

Affirmed.

RILEY, J., and DARDEN, J., concur.